

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
International Settlements Policy Reform)	IB Docket No. 02-324
International Settlement Rates)	IB Docket No. 96-261

**EX PARTE COMMENTS OF AT&T CORP., THEODORE J. NIEHAUS,
CORINNE M. ALLEN AND OLEN FRANK PHILBRICK
REQUESTING ENFORCEMENT OF INTERNATIONAL SETTLEMENTS
BENCHMARK RATES AGAINST FRAUDULENT AUDIOTEXT PRACTICES.**

AT&T Corp. (“AT&T”), Theodore J. Niehaus, Corinne M. Allen, and Olen Frank Philbrick file these joint *ex parte* comments in the above-referenced proceeding to request the Federal Communications Commission (“FCC”) to adopt a policy of steadfast enforcement against countries allowing fraudulent audiotext practices of its Report and Order adopted August 7, 1997, establishing clear benchmarks governing the international settlement rates that U.S. carriers may pay foreign carriers to terminate international traffic originating in the United States. In re International Settlement Rates, IB Docket No. 96-261, FCC 97-280, 12 F.C.C.R. 19,806, *aff’d sub nom.*, Cable and Wireless P.L.C. v. FCC, 166 F.3d 1224 (D.C. Cir. 1999), Report and Order on Reconsideration and Order Lifting Stay, 14 F.C.C.R. 9256 (1999) (“Benchmarks Order”).

BACKGROUND

AT&T, Theodore J. Niehaus, Corinne M. Allen, and Olen Frank Philbrick were parties to a lawsuit filed in the United States District Court for the Southern District of New

York entitled Niehaus v. AT&T Corp., No. 01 Civ. 3030 (JSR) (the “Action”). In the Action, Niehaus, Allen and Philbrick alleged that they received telephone bills from AT&T containing charges for calls to the island nations of Vanuatu and/or Niue which they had not placed or authorized. The plaintiffs in the Action alleged, *inter alia*, that such charges resulted from unknown and unauthorized “modem hijackings,” whereby unscrupulous audiotext providers had induced consumers to download dialer software designed to disconnect their computer modems from legitimate Internet service providers and dial international telephone numbers. Such consumers were then billed for the resulting international, direct-dial calls, usually at high per-minute rates that exceeded the FCC’s established benchmark rates. Plaintiffs claimed that, since the charges AT&T sought to collect were (at least in part) for audiotext and/or entertainment services, they were not regulated charges subject to the filed rate doctrine. As such, plaintiffs alleged that AT&T could not collect the charges under the threat of disconnection of service, and without proof that the line subscriber had personally authorized the charges.

In moving to dismiss the Action, AT&T denied any wrongdoing and liability, because, among other reasons: (1) AT&T acted solely as a common carrier providing basic transmission service pursuant to the applicable tariff in effect at the time the calls were placed, AT&T FCC No. 27; (2) AT&T had (and has) no contracts with service bureaus or information providers with respect to the calls about which Plaintiffs complained; (3) AT&T billed Plaintiffs based on its own network switch records, which showed definitively that the relevant calls originated at the plaintiffs’ respective numbers and were delivered to its network, and not on the basis of any third-party billing records; and (4) AT&T has not collected one penny more than its tariff rate for these calls, has not “shared” that tariffed revenue with anyone, nor collected any money for those calls on a third party’s behalf. AT&T thus asserted that each call in question

was in fact properly billed as a regulated, international, direct-dialed call in accordance with the terms of the applicable tariff.

By Order dated September 28, 2001, and for reasons further elaborated in a Memorandum Order dated September 6, 2002, the Honorable Jed S. Rakoff, United States District Judge, dismissed or stayed certain of the claims asserted in the Action, and referred the remainder to the FCC for adjudication under the doctrine of primary jurisdiction. Pursuant to Judge Rakoff's referral, the parties met in person and by telephone on several occasions with staff members of the Enforcement Bureau and Consumer Affairs Division of the FCC, in order to present their respective positions, address procedural matters, and explore possible settlement.

Through extensive discussions among the parties and the staff of the Enforcement Bureau and Consumer Affairs Division of the FCC, the parties came to believe that the calls and charges giving rise to the dispute underlying the Action were generated through the deceptive practices of audiotext providers operating in Vanuatu and Niue or elsewhere, who employ various schemes to increase telephone traffic to those countries and derive revenue therefrom. In the course of the parties' discussions under the aegis of the FCC staff, it has appeared that the provision of audiotext services to U.S. consumers from foreign locations is made economically attractive as a result of the above-cost settlement rates that foreign correspondents require U.S. carriers to pay to complete calls to their countries. It appears that unscrupulous audiotext providers establish their operations in connection with, and generate U.S.-based telephone traffic to, countries with extremely high settlement rates, often in the \$1.50 to \$2.00 per-minute range. The foreign correspondents apparently share the resulting U.S. carrier settlement outpayments with the audiotext providers, in effect subsidizing their fraudulent activity. It also appears that certain audiotext providers have used unscrupulous methods to induce these calls to be placed

(e.g., “modem hijackings”), which in turn has given rise to customer complaints that they are being billed for calls that they assert were not made and/or were unauthorized.

AT&T, Theodore J. Niehaus, Corinne M. Allen, and Olen Frank Philbrick believe that enforcement of the Benchmarks Order in such instances will result in meaningful progress toward eliminating fraudulent practices associated with the audiotext business that have adversely affected U.S. consumers. Moreover, enforcement of the Benchmarks Order will not prevent legitimate audiotext providers from conducting business and billing for their services, as there exist multiple legitimate methods of billing for such services, including credit card billing, and billing through common carriers in accordance with FCC regulations specifically intended to govern billing for pay-per-call entertainment and information services. *See, e.g., Telephone Disclosure & Dispute Resolution Act*, 15 U.S.C. § 5701, *et seq.*; *Regulation of Carrier Offering of Pay-Per-Call Services*, 47 U.S.C. § 228; *Interstate Pay-Per-Call and Other Information Services*, 47 C.F.R. § 64.1501, *et seq.*; *Truth-in-Billing Requirements for Common Carriers*, 47 C.F.R. § 64.2400, *et seq.*

Given their shared interest in resolving their dispute in a way that will benefit United States consumers, and avoid the costs of protracted litigation, AT&T, Theodore J. Niehaus, Corinne M. Allen, and Olen Frank Philbrick agreed to settle the Action on the basis that they will jointly make this submission to the FCC for enforcement of the Benchmarks Order to prevent fraudulent practices of audiotext providers that adversely affect U.S. consumers. By Order dated March 3, 2003, Judge Rakoff approved the parties’ settlement and dismissed the Action.

REQUESTED ACTION

Since its issuance in 1997, the Benchmarks Order has successfully reduced the cost to U.S. consumers of calling many international destinations. Indeed, more than 90% of all U.S.-to-international minutes are being settled at or below the applicable benchmark rates. Where good-faith negotiations with foreign carriers have failed to yield settlement rates that comply with the Benchmarks Order, AT&T and others have successfully petitioned the FCC for enforcement of its Benchmarks Order with respect to those terminating carriers. Nevertheless, many foreign carriers have failed to reduce their settlement rates to the applicable benchmark levels set by the Benchmarks Order. Many of these failures to comply with the Benchmarks Order involve foreign carriers that use above-benchmark settlement payments, in part, to compensate unscrupulous audiotext providers for the increased call volume they generate.

AT&T, Theodore J. Niehaus, Corinne M. Allen, and Olen Frank Philbrick believe that by expanding its efforts to enforce the Benchmarks Order, especially to those countries known to do business with audiotext providers that engage in deceptive practices, the FCC can deal a serious blow to those providers that prey upon United States consumers by using unscrupulous means to generate audiotext calls and revenue. As foreign carriers lower their settlement rates for U.S.-originated traffic, the economic viability of profit-sharing arrangements between foreign carriers and audiotext providers who engage in unscrupulous practices (such as “modem hijackings”) will be compromised, and such providers will no longer be able to operate by deceiving individuals into paying excessive, above-benchmark rates that are ultimately shared with the audiotext providers. Indeed, as shown by the International Bureau’s Section 43.61 International Traffic Data 2001 Report, it is apparent that the volume of audiotext traffic to a

given country drops precipitously once settlement rates between that country and the U.S. are brought into line with benchmark levels.

AT&T, Theodore J. Niehaus, Corinne M. Allen, and Olen Frank Philbrick accordingly urge the Commission to adopt a policy of steadfast enforcement of the Benchmarks Order with respect to countries where audiotext providers have acted fraudulently to stimulate outbound calling to foreign correspondents where settlement rates are substantially in excess of benchmark levels. The Commission should encourage U.S. carriers and other interested parties to submit any evidence of such conduct pursuant to the procedures for enforcement petitions established in the Benchmarks Order (para. 186), and should take account of such evidence in determining the appropriate enforcement action to take. (*See, id.*, para. 187.) Moreover, the Commission should adopt a policy requiring enforcement of the Benchmarks Order with respect to all foreign carriers that demand settlement rates substantially in excess of benchmark levels where it finds credible evidence that those settlement rates are used to subsidize fraudulent audiotext practices.

The International Bureau has been responsive to U.S. carriers' petitions for enforcement of the Benchmarks Order and the Commission's International Settlements Policy with respect to specific foreign carriers that refuse to lower their settlement rates to benchmark levels, or otherwise manipulate their settlement rates in ways that harm American consumers. *See, e.g., In re AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief*, IB Docket No. 03-38, 2003 WL 901908 (Mar. 10, 2003) (enforcing International Settlements Policy against Philippine carriers); *In re AT&T Corp., WorldCom*, 16 F.C.C.R. 16,203 (Sept. 5, 2001) (approving petition for enforcement of benchmark settlement rate of 15 cents for international message telephone service with Qatar); *In*

re AT&T Corp., MCI WorldCom, Inc., Sprint Communications Co., 14 F.C.C.R. 8874 (June 3, 1999) (approving similar petition concerning Cyprus). Enforcement of the Benchmarks Order to address fraudulent audiotext practices will benefit U.S. consumers by resulting in meaningful progress toward the elimination of those practices.

It should be noted that enforcement of the Benchmarks Order will not preclude legitimate audiotext businesses from providing and billing for their services. Notwithstanding any action taken by the FCC in response to this submission, audiotext providers will remain able to bill for their services by multiple methods, such as by credit card or through common carriers in accordance with FCC regulations specifically intended to govern billing for pay-per-call entertainment and information services. *See, e.g., Telephone Disclosure & Dispute Resolution Act*, 15 U.S.C. § 5701, *et seq.*; Regulation of Carrier Offering of Pay-Per-Call Services, 47 U.S.C. § 228; Interstate Pay-Per-Call and Other Information Services, 47 C.F.R. § 64.1501, *et seq.*; Truth-in-Billing Requirements for Common Carriers, 47 C.F.R. § 64.2400, *et seq.*

For these reasons, AT&T, Theodore J. Niehaus, Corinne M. Allen, and Olen Frank Philbrick urge the Commission to adopt a policy of steadfast enforcement of the Benchmarks Order with respect to all foreign carriers that continue to demand settlement rates substantially in excess of benchmark levels upon receipt of credible evidence those settlement rates are used to subsidize fraudulent audiotext practices.

Dated: September 9, 2003

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CERTIFICATE OF SERVICE

I, John J. Kuster, do hereby certify that on this 9th day of September 2003, a copy of the foregoing “*Ex Parte* Comments of AT&T Corp., Theodore J. Niehaus, Corinne M. Allen and Olen Frank Philbrick requesting Enforcement of International Settlements Benchmark Rates Against Fraudulent Audiotext Practices” was served by U.S. first class mail, postage prepaid, upon the parties listed below:

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